78-1580

IN THE
SUPREME COURT OF THE UNITED STATES

SHEILA BROOKS, SHARON ENGELS, BARBARA GUYTHO, JOAN LEITMAN, SHEILA MARCUS, BEVERLY PIVAWER, ARLENE SONFIST, and LARENE SZESZKO,

Petitioners,

-against-

IRVING ANKER, MURRAY ROCKOWITZ, BOARD OF EDUCATION OF THE CITY OF NEW YORK and BOARD OF EXAMINERS OF THE CITY OF NEW YORK,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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Cases Cited

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STATEMENT OF THE CASE

Petitioners, women teachers in the New York City public schools, were granted their provisional teaching licenses between February, 1968 and September, 1969 after successful completion of competitive examinations administered by the repondents. Petitioners were notified that retention of the licenses was conditioned upon completion of certain academic requirements within five years of the date specified in the examination announcement. Failure to comply with this condition would result in termination of the license.

The necessary academic preparation requirements were and are either the attainment of a Master's Degree or completion of 30 hours of graduate study. Alternatively, if a teacher satisfactorily completed three years of probationary teaching, she could obtain tenure and teach without fulfilling the requirements. In addition to being informed of the five year time period within which to satisfy the eligibility requirements, plaintiffs were also advised in the

examination announcement that extensions of time beyond the five year period would be allowed only for military service pursuant to N.Y. Military Law §243. None of the petitioners was eligible for the extension.

During the five year period, seven of the eight petitioners became pregnant,* necessitating their taking unpaid mandatory maternity leaves of absence pursuant to Section 107 of the By-laws of the Board of Education then in effect.** However, while leave was compulsory and the suggested period of absence was four years, a teacher could, if she so desired,

*Petitioner Guyhto's time for completing the requirements, July 1, 1972, had already expired prior to her commencing her maternity leave of absence on September 8, 1972.

**Section 107 was amended November 28, 1973 to eliminate mandatory maternity leave.

continue teaching until a date specified by her physician and concurred in by the Board's medical staff, and terminate the leave any time after the birth of her child, if she was certified by her doctor and the Board to be in good health. Once so certified, she could resume teaching on the first day of the following semester.

None of the eight petitioners had completed the educational requirements or taught satisfactorily for three years within the time allotted. Consequently, between June, 1973 and June, 1975, each of the petitioners was notified of the termination of her provisional license.

Petitioners thereafter brought this action claiming denial of due process of law under the Fourteenth Amendment by virtue of their having been forced to take maternity leave without an extension

of time to fulfill the academic requirements. They further alleged a denial of equal protection, in that the rule (former Section 238 of the Board's By-laws) concerning extensions of time for completing the requirements for eligibility for a permanent license unfairly discriminated against women by not providing an extension of time on account of pregnancy. The rule, claim the petitioners, was underinclusive in limiting such extensions to those on military leave of absence and, therefore, violative of the Fourteenth Amendment.

OPINION OF THE DISTRICT COURT

Judge BARTELS denied petitioners' motion for summary judgment and granted respondents' counter-motion. He concluded that the mandatory maternity leave, in per-

mitting a teacher individually to determine her fitness to pursue her teaching duties both during and after her pregnancy, was neither arbitrary nor capricious and did not treat "all pregnant teachers alike in their ability or inability to work", citing Cleveland Board of Education v. La Fleur, 414 U.S. 632 (1974).

With respect to the equal protection claim, the District Court ruled that the classification based on pregnancy and the requirement of compulsory maternity leave had no effect on petitioners' right to bear children or their ability to complete the academic or teaching requirements. The District Court further held the refusal to allow pregnancy as a ground for extension of time to fulfill the license requirements a legitimate practice insofar as the Board also disallowed extensions for all

other reasons except military service. The exception for those on military leave, Judge BARTELS concluded, is rationally related to a legitimate state interest and is not violative of equal protection.

DECISION OF THE COURT OF APPEALS

The Court of Appeals affirmed the judgment of the District Court on the opinion of Judge BARTELS.

ARGUMENT

THIS CASE DOES NOT PRESENT ANY SUBSTANTIAL QUESTION WHICH REQUIRES CONSIDERATION BY THIS COURT

(1)

At the outset of their discussion, petitioners state the well established principle that the right to bear children is constitutionally protected. We have no quarrel with that point of law, and

we fail to see in what respect it is relevant to the instant matter. Far from infringing petitioners' constitutional right to bear children, respondents' maternity leave regulations protected such right by securing the right to return to their teaching duties upon termination of their leaves of absence. Cf. Buckley v. Colye Public Sch. Syst. 476 F. 2d 92 (10th Cir., 1973) (pregnant teachers' dismissal at end of sixth month of pregnancy held unconstitutional).

Moreover, the regulations in question were tailored to the petitioners' individual needs, in that each petitioner was permitted to continue teaching until a date specified by her physician and concurred in by the Board's medical staff, and to terminate her leave any time after

the birth of her child if she was certified by her doctor and the Board to be in good health. These regulations were fully consistent with this Court's decision in Cleveland Board of Education v. La Fleur, 414 U.S. 632 (1974). There, this Court held that "overly restrictive" mandatory maternity leave regulations establishing arbitrary cutoff dates for taking and terminating leaves of absence violated the Due Process Clause by creating an irrebuttable presumption that a woman is physically unfit to work a set number of months both before and after childbirth. Clearly, the rule applied to these petitioners was entirely consistent with the

standard established in LaFleur.*

(2)

Petitioners have not presented this Court with any sound basis for believing that the military service exception to completion within five years of the academic preparation requirements, which exception is open to both men and women teachers, was arbitrary, or unreasonable, or discriminatory with respect to pregnant

*At page 8 of their petition, petitioners assert that the "maternity regulation made it more difficult for women to retain their licenses by requiring them to take a leave of absence from the end of the seventh month until permitted to return." It should be noted, however, that they did not allege in the District Court that they were, in fact, ordered or required to take their leaves other than pursuant to the regulations in question, that is, on an individual basis. Indeed, the Court of Appeals expressly found that "there was no issue before Judge Bartels as to whether the Board's regulations were in fact followed in practice during the period in question."

teachers. On the contrary, the extension of time based on Section 243 of the New York Military Law, is rationally related to the legitimate governmental interest in providing special protection for those who leave their jobs to serve in the military, thereby securing the State's defense. See New York City Bd. of Educ. v. New York State Hum. Rts. Div., 54 AD 2d 656, 387 N.Y.S. 2d 873 (1st Dept., 1976).

Pregnancy was not the only disability for which an extension of time was not allowed. Neither illness, hospitalization, death or sickness in the family, nor the counterpart of maternity leave for fathers-child care leave-constituted grounds for granting an extension. Hence, petitioners have been given the same treatment accorded all other members of the class of teachers, regardless of sex.

"Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation ... on any reasonable basis, just as with respect to any other physical condition." Geduldig v. Aiello, 417 U.S. 484, 496-497, n. 20 (1974). Although pregnancy leave necessarily affects only one sex, as long as a rational basis for the rule can be demonstrated, there exists no violation of petitioners' rights to equal protection. The mere fact that respondents now permit extensions for maternity leave does not undermine the legitimacy of the earlier policy. This Court has held that "consistently with the Equal Protection Clause, a State 'may

take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. ...' Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955); Jefferson v. Hackney, 406 U.S. 535 (1972)." Geduldig v. Aiello, 417 U.S. 484, 495 (1974); accord, Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976); Dandridge v. Williams, 397 U.S. 471 (1970).

Finally, we would note that petitioners have not demonstrated how the Second Circuit's affirmance conflicts with the decisions of this or any other court.

Conclusion

The petition for a writ of certiorari should be denied.

May 18, 1979

Respectfully submitted,

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